No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

—v.—

COMMON CAUSE, ET AL.,

Appellees.

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

APPELLEES' JOINT MOTION FOR DIVIDED ARGUMENT AND ENLARGEMENT OF ARGUMENT TIME

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—v.—

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Pursuant to Supreme Court Rules 21 and 28.3–4, Appellees in these consolidated challenges to North Carolina's 2016 Congressional Plan (hereinafter, "*Common Cause* Appellees" and "*League* Appellees") jointly move for equally divided argument time and to enlarge the total argument time for each side from 30 minutes to at least 40 minutes. Appellees have conferred with counsel of record for Appellants in both cases, and Appellants consent to division of Appellees' argument and take no position on the motion to enlarge argument time, provided both sides' time is enlarged equally.

I. DIVIDED ARGUMENT IS APPROPRIATE.

Divided argument is appropriate because of differences in the cases presented by the two sets of Appellees. To be clear, the differences are not about the ultimate constitutional violations. Appellees agree that partisan gerrymandering "jeopardizes '[t]he ordered working of our Republic,'" *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring)), and violates core constitutional guarantees. Appellees further agree that *any* of the approaches proposed in this case constitutes a "judicially discoverable and manageable" standard, and that the claims asserted here do not "turn on standards that defy judicial application," as true "political questions" do. *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962). Appellees also agree that the egregious facts of this case make out a clear constitutional violation under any of the legal theories presented.

At the same time, as this Court recognized last year, partisan gerrymandering presents "an unsettled kind of claim" whose "contours" remain "unresolved."

Gill, 138 S. Ct. at 1934. Absent definitive guidance from this Court, litigants have advanced different theories, relying on different provisions of the Constitution, different threads of this Court's case law, different forms of evidence, and different categories of plaintiffs. As discussed below, this is a case in point. Divided argument will permit the Court to better explore and understand these differences and their ramifications—and, thereby, bring clarity to this "unsettled" area.

First, Appellees press different theories of unconstitutionality. While both sets of Appellees challenge the 2016 Plan under the Equal Protection Clause and First Amendment based on a vote-dilution theory of harm, the *Common Cause* Appellees raise additional theories that the *League* Appellees do not.

In particular, only the *Common Cause* Appellees assert First Amendment claims based on the "associational theory" of harm described in the *Gill* concurrence. 138 S. Ct. at 1934, 1938–39 (Kagan, J., concurring). This theory is "distinct from vote dilution," and "everything about the litigation of [a partisan-gerrymandering] claim—from standing on down to remedy"—may differ depending on whether the plaintiff asserts dilutionary or associational harm. *Ibid.*

Similarly, only the *Common Cause* Appellees assert claims under Article I, §§ 2 and 4. These provisions make clear that state legislatures have "no[] ... power to dictate ... outcomes" of congressional elections or "to favor or disfavor a class of candidates ...." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833–34 (1995). This Article I challenge, therefore, asserts a "structural" violation of the same type this Court has

recognized in other situations where a "government acts in excess of its lawful powers." App–82 (quoting *Bond v. United States*, 564 U.S. 211, 220–22 (2011)). The District Court held that the 2016 Plan violates all of these constitutional provisions and causes each of these types of harm. Counsel for each respective set of Appellees is best positioned to present argument to this Court regarding the distinct claims and theories of injury that they raised and briefed below.[1]

Second, while both sets of Appellees assert vote-dilution claims under the Equal Protection Clause and First Amendment, their proposed tests are different. For example, the *League* Appellees argue that, to prevail on a vote-dilution claim, a plaintiff must prove that (1) a particular district was drawn with partisan intent; and (2) this district belongs to a district plan that is severely and durably asymmetric. The *League* Appellees would also provide the defendant with an opportunity to show that this asymmetry is justified by the jurisdiction's political geography or nonpartisan redistricting objectives, in which case no liability would attach. By contrast, the *Common Cause* Appellees argue that, to prevail on a vote-dilution claim, a plaintiff need only show that invidious partisan intent was the predominant consideration in the drawing of his or her district's boundaries, and that the weight of his or her vote was measurably diminished as a result. Thus, the *Common Cause* Appellees' vote-dilution theory does not require showings of severe or durable plan-wide asymmetry. Especially given the scarcity of precedent in this area, Appellees believe the Court would benefit by

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[1] The plaintiffs-appellees in *Lamone v. Benisek*, No. 18-726, assert "associational theory" claims under the First Amendment, but do not assert claims under Article I.

engaging with both sets of Appellees' respective approaches to vote-dilution claims.

Third, Appellees proffered different forms of empirical evidence. At trial, the *Common Cause* Appellees relied principally on the analyses of Dr. Jonathan C. Mattingly and Dr. Jowei Chen, who employed computer algorithms to generate thousands of alternative districting maps, and then used real-world, precinct-level election data to simulate hypothetical elections under each such map. *Common Cause* Mot. to Affirm at 10–12. On remand, the *Common Cause* Appellees presented Dr. Chen's supplemental analysis, showing where the partisan split of each voter-plaintiff's actual district under the 2016 Plan lies on the continuum of thousands of hypothetical districts in which that voter might have been placed. *Id.* at 13–14. The *Common Cause* Appellees did not rely on any plan-wide measures of partisan asymmetry.

By contrast, at trial, the *League* Appellees presented several plan-wide measures of partisan asymmetry to show the 2016 Plan's extremity: Dr. Simon Jackman's calculations of the efficiency gap, partisan bias, and the mean-median difference. The *League* Appellees also presented Dr. Jackman's "sensitivity testing," which revealed that the 2016 Plan would remain skewed in any plausible electoral environment. The *League* Appellees further relied on Dr. Chen's alternative districting maps, though with their summary statistics reported in efficiency gaps as well as seats. *League* Mot. to Affirm at 13–16. On remand, the *League* Appellees selected a single alternative map generated by Dr. Chen ("Plan 2–297"), and explained how League members cracked or packed by the 2016 Plan are uncracked or unpacked by this map. *Id.* at 9–13.

The District Court found all of these different forms of "empirical evidence" compelling, especially as they "all point[ed] to the same conclusion." App–133. However, the Court may be interested in exploring their significance individually, and each set of Appellees is best positioned to offer argument regarding the analyses that they presented below.

Fourth, while both sets of Appellees include individual North Carolina voters and a nonprofit voting-rights organization, only the *Common Cause* Appellees include an injured political party. Four Justices have emphasized the unique position political parties occupy with respect to partisan gerrymandering, which "weakens [a party's] capacity to perform all its functions." *Gill*, 138 S. Ct. at 1938 (noting that "what is true for party members may be ... triply true for the party itself"). Only the *Common Cause* Appellees have briefed and developed the arguments involving standing, liability, and remedy for statewide challenges brought on behalf of a political party.[2]

This Court has previously granted divided argument where aligned parties pressed different claims or advocated different doctrinal approaches—including in gerrymandering cases. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 52 (2017) (permitting divided argument between appellants, members of the Wisconsin Elections Commission, and their *amici*, Wisconsin State Senate and Assembly); *Ala. Democratic Conf. v. Alabama*, 135 S. Ct. 434 (2014) (permitting divided argument between challengers to Alabama districting plan where they advanced different analytical frameworks); *LULAC v. Perry*, 126 S. Ct. 1186 (2006)

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[2] The plaintiffs in *Lamone* are all individual voters (some of whom are also party or campaign officials) and do not include a political party.

(permitting divided argument between challengers to Texas districting plan where they "d[id] not join each other as to all claims"); *see also Am. Legion v. Am. Humanist Ass'n*, 2019 U.S. LEXIS 793 (Jan. 22, 2019) (permitting divided argument where co-parties had "distinct interests" and had "pressed different arguments" below). It should do the same here.

II. ENLARGEMENT OF ARGUMENT TIME IS APPROPRIATE.

In addition to divided argument, Appellees request enlargement of the combined argument time for each side from 30 to at least 40 minutes.

This Court has granted additional time where separately filed cases presenting distinct claims are consolidated for argument. *See* Shapiro et al., Supreme Court Practice 780 n.31 (10th ed. 2013). Here, as discussed above, these consolidated cases present distinct claims, theories, and evidence meriting full exploration.

This Court has also granted additional time in cases of "extraordinary public importance and difficulty," including redistricting cases. *Id.* at 790–91; *see, e.g.*, *United States v. Texas*, 136 S. Ct. 1539 (2016) (90 minutes); *Wittman v. Personhuballah*, 136 S. Ct. 1241 (2016) (70 minutes); *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (150 minutes); *NFIB v. Sebelius*, 132 S. Ct. 1618 (2012) (six hours); *Citizens United v. FEC*, 557 U.S. 952 (2009) (80 minutes); *LULAC v. Perry*, 126 S. Ct. 827 (2005) (120 minutes); *McConnell v. FEC*, 124 S. Ct. 16 (2003) (four hours); *Bush v. Vera*, 116 S. Ct. 295 (1995) (80 minutes). This is such a case: the issues involved are both unusually "unsettled," *Gill*, 138 S. Ct. at 1934, and exceptionally "urgent," *id.* at 1941 (Kagan, J., concurring).

* * *

For the reasons stated, Appellees respectfully request that the Court grant equally divided argument time to the *Common Cause* and *League* Appellees and enlarge the total argument time for each side from 30 to at least 40 minutes.

Respectfully submitted,

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February 5, 2019